This apparent prejudice against a valuable equitable remedy makes especially noteworthy the issuance of the writ of *ne exeat* in the principal case, where no pecuniary demand was involved. The Chancellor held that even though there might be no precedent for this use of the writ,[21] equity would "make a precedent to fit a case, novel in incident, which comes within some head of equity jurisprudence." [22] An injunction would have been inadequate. The court could have enjoined the defendant from taking the child out of the state, and ordered her to give security that she would not leave.[23] But she might disobey the court, and get the child into another state before the decree could be enforced by contempt proceedings. And a court of equity in another state could not secure to the father, *in specie*, his right to have access to the child in New Jersey. A writ of *ne exeat*, on the other hand, would keep the defendant in custody in New Jersey, until she gave security. It would accomplish the result aimed at by an injunction in a more effective manner; and there is no reason, on principle, why it should not be issued in such cases.[24] Where the plaintiff's case is clear, and his remedy at law is inadequate, equity should disregard all arbitrary limitations, and make use of every remedy which it possesses, in order to secure the plaintiff's rights.[25]

ADMISSIBILITY OF HEARSAY EVIDENCE BEFORE AN ADMINISTRATIVE TRIBUNAL. — The rapid development of administrative law, with the consequent delegation of quasi-judicial authority to boards and commissions, raises the question whether such a body is bound by the established rules of judicial procedure or may act in accordance with the principles governing the ordinary transaction of business.[1] Two recent California cases have held it reversible error for the commission to base its findings upon hearsay under a Workmen's Compensation Act permitting the commission to disregard "technical rules of evidence." *Englebretson* v. *Industrial Accident Commission*, 151 Pac. 421; *Employers' Assurance Corporation* v. *Industrial Accident Commission*, 151 Pac. 423. A recent New York case comes to the opposite conclusion.[2]

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exeat issues only when the case is within the exceptions of the Debtors Act, 1869 (32 & 33 VICT., c. 62), § 6. Drover *v.* Beyer, 13 Ch. Div. 242.

[21] *Cf. In re* J. Watts Kearney, Jr., 21 N. J. L. J. 25.

[22] *Cf.* Earle *v.* American Sugar Refining Co., 74 N. J. Eq. 751, 761, 71 Atl. 391, 395.

[23] De Manneville *v.* De Manneville, 10 Ves. Jr. 52.

[24] In New York a defendant may now be arrested whenever his contemplated departure from the state threatens to render ineffectual any judgment or order requiring the performance of an act, the non-performance of which would be punishable as a contempt. This is a statutory substitute for the writ of *ne exeat*. BLISS, N. Y. ANN. CODE, 6 ed., § 550.

[25] See Chancellor Kent's opinion in Porter *v.* Spencer, 2 Johns. Ch. (N. Y.) 169. *Cf.* also, Fisher *v.* Stone, 4 Ill. 68, 70; Lucas *v.* Hickman, 2 Stewart (Ala.) 111, 114.

[1] See Local Government Board *v.* Arlidge, [1915] A. C. 120, 132, 133. 31 LAW QUART. REV. 148, 150.

[2] For the facts of the cases here discussed, see RECENT CASES, p. 227.

Carroll v. *Knickerbocker Ice Co.*, 155 N. Y. Supp. 1. The two cases can be easily distinguished upon the wording of the statutes,[3] but they are so clearly opposed in spirit and reasoning [4] that a more fundamental difference is apparent.

The importance of these decisions is emphasized by the fact that of the twenty-four [5] states which have adopted Workmen's Compensation statutes, fifteen have placed the administration of the act in the hands of a commission or administrative officer.[6] Only three [7] of these states have adopted a provision similar to the one here discussed, but in almost every other case the legislature has given the commission power either to "regulate the nature and extent of proofs and evidence and the method of taking and furnishing the same," [8] or to "adopt reasonable and proper rules to govern its procedure." [9] Under such a provision at least one commission [10] has adopted a rule similar to the statute here discussed, and the power of the commission to do so is clear under such an act.[11] The statutes in question, as interpreted by the New York court, allow the commission a very broad discretion, but the construction by the California court seems unduly narrow, for the evident intention of the legislature was to allow the commission, within its dis-

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[3] By CAL. LAWS, 1913, ch. 176, § 77, the commission shall not "be bound by technical rules of evidence." By N. Y. LAWS, 1914, ch. 41, § 68, the commission is not "bound by common law or statutory rules of evidence." Though it is a conceivable conclusion that the hearsay rule is not a "technical rule of evidence," there can be no doubt that it is a "common-law rule."

[4] Howard, J., in Carroll *v.* Knickerbocker Ice Co., 155 N. Y. Supp. 1, 3. "The very instant that the old rules of evidence are invoked, the informal character of the hearing disappears and the rigid formal rules of procedure and all the technicalities incident to the practice of law will grow up around the commission."

Shaw, J., in Englebretson *v.* Industrial Accident Commission, 151 Pac. 421, 423. "If the circumstance that the eyewitness of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property."

[5] Statutes were examined down to March 1, 1915, only.

[6] These statutes may be found conveniently collected in 2 BRADBURY, WORKMAN'S COMPENSATION. England and the seven Canadian states which have workmen's compensation acts have provided for arbitration with resort to the courts.

[7] Connecticut (LAWS, 1913, ch. 138, § 25) is the only state beside New York and California.

[8] Kentucky (LAWS, 1914, ch. 73, § 7), Nevada (LAWS, 1913, ch. 111, § 12), and West Virginia (LAWS, 1913, ch. 10, § 8) have essentially this provision, in addition to New York and California.

[9] Illinois, Iowa, Massachusetts, Michigan, Ohio, Oregon, Texas, and Wisconsin, as well as the states mentioned in the preceding note, have substantially this provision.

[10] Rule 7 of OHIO INDUSTRIAL COMMISSION provides that: "The Commission will not be bound by the usual common law or statutory rules of evidence." See 1 BRADBURY, WORKMAN'S COMPENSATION, 2 ed., 876.

[11] The holding of the court in the Englebretson case, *supra*, to the effect that this was an unconstitutional delegation of authority, must be regarded as the expiring gasp of a dying dogma. CAL. CONST., Art. III, reads: "No person charged with the exercise of powers properly belonging to one of these departments [legislative, executive, or judicial] shall exercise any functions appertaining to either of the others." However, Art. XX, § 21, as amended to allow the passage of the Workmen's Compensation Act, says: "The legislature may provide for the settlement of disputes . . . by an industrial accident board . . . anything in the constitution to the contrary notwithstanding." This amendment is clearly broad enough to justify the act as passed. See McCullough *v.* Maryland, 4 Wheat. (U. S.) 316, 408, 415, 421.

cretion, to receive any logically probative matter.[12] That hearsay has considerable value as proof is hardly open to question. Indeed the courts have repeatedly held that if evidence of a hearsay character gets in unobjected to it must be given its full weight.[13] Many of the code states have modified the hearsay rule [14] and one of the others [15] has so limited it that any of the declarations ruled upon in the three cases here considered would have been admissible within the discretion of the trial judge. It is clear that a similar modification is more than justified in the case of administrative tribunals, especially as the growth of the excluding rules of evidence was due to the practical needs of trials before undiscriminating juries.[16]

As the functions and duties of government expand, and statutes like the present add increasingly to governmental responsibilities, it is inevitable that a large amount of business which was once carried on by private individuals will be put into the hands of various governmental agencies.[17] In the transaction of this business many questions of a judicial or quasi-judicial nature must be decided, and it has become increasingly evident that the common-law court cannot adapt itself to the decision of technical questions of mechanics, railroad management, physics, and chemistry, or the broad considerations of economic policy which are necessarily involved in these new functions. The rigidity of the common-law procedure, the fact that the jury were chosen without regard for their ability, the lack of confidence in the jury and the trial judge, and the necessarily contentious nature of the proceedings, established a great number of rigid and technical rules and made inevitable the introduction of the administrative tribunal.[18] These bodies are, in theory, composed of trained men who are fitted by education and experience to pass upon the very questions which are presented, and ready to approach each case with an open and unprejudiced mind.

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[12] This intention is indicated both by § 77, authorizing the commission to disregard "technical rules of evidence," and by § 75 (6), giving the commission power to "regulate the nature and extent of the proofs and evidence."

[13] Damon *v.* Carroll, 163 Mass. 404, 408; Diaz *v.* United States, 223 U. S. 442, 450; Kansas City & So. Ry. *v.* Albers Commission Co., 223 U. S. 573, 596; Kimmerle *v.* Farr, 189 Fed. 295, 298. This is the point that Woodward, J., dissenting in the New York case, seems to have overlooked when he maintains that the statute merely allows the commission to admit hearsay, but still requires the award to be based on "legal" evidence. From the cases above cited it is clear that the exclusion of hearsay is not regarded as inherently necessary to proper judicial process.

[14] See, for example, IOWA CODE, §§ 4621, 4622.

[15] MASS. R. L., 1902, ch. 175, § 66: "No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant." In a recent case the declarations of a deceased employee were admitted under this statute before the Industrial Accident Board to support a recovery under the Workmen's Compensation Act. The case is very similar to those here discussed. Pigeon's Case, 216 Mass. 51, 102 N. E. 932.

[16] See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 180, 267 *et seq.*; 1 WIGMORE, EVIDENCE, § 8; Mansfield, C. J., in Berkeley Peerage Case, 4 Campb. 414, 415; MAINE, VILLAGE COMMUNITIES, 3 ed., 302.

[17] See n. 1, *supra*.

[18] See Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 44; United States *v.* Uhl, 215 Fed. 573, 574; *In re* Georgia & Florida Ry., 215 Fed. 195, 199.

It will improve neither the caliber nor the administrative efficiency of these tribunals to confine them to the crystallized and archaic methods of the common law. Men of power, insight, and wide experience can be secured upon a commission only if it is clothed with large discretion and given the means to make its own decisions reasonably effective; not, however, if it is to be a mere automaton for the application of unscientific legislative measures. Courts were foredoomed to failure in handling these complex questions because of their inelastic machinery. Administrative tribunals, now in their formative period, may come to similar grief, unless they are kept free from annoying restrictions of form and procedure.

THE EFFECT IN FEDERAL PRACTICE OF GIVING A CRIMINAL DEFENDANT NOTICE TO PRODUCE DOCUMENTS IN HIS POSSESSION. — That over-careful regard for the rights of the criminal defendant,[1] which is still occasionally noticeable in the reports, seems lately to have been responsible for some unfortunate reasoning in the federal courts. In a recent case the Circuit Court of Appeals for the Seventh Circuit held that it was error, though not prejudicial in the particular case, for the trial court to allow the prosecuting attorney to read before the jury a notice to the defendant to produce certain letters which he had in his possession. *Hanish* v. *United States* (not yet reported).[2] This *dictum* is in accord with *McKnight* v. *United States*,[3] an earlier case in the Sixth Circuit, in which the presentation of notice was given as a ground for reversing judgment. The ruling seems to be based on the ground that to allow such notice would permit inferences to be drawn which would be a violation of the defendant's constitutional right of immunity against self-incrimination.[4] By statute in almost every state and by the federal law, unfavorable inferences may not be drawn from the accused's failure to testify,[5] but by the weight of authority the jury is permitted to take into account the criminal defendant's failure to produce witnesses, or, so the cases seem to decide, documents not of his own authorship.[6]

It would seem, however, erroneous to bring notice to produce within

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[1] See BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, Book IX, pt. IV, c. III.

[2] For a full statement of this case, see RECENT CASES, p. 223.

[3] 115 Fed. 972, 976.

[4] The Fifth Amendment of the federal Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. This has been held to apply only to the federal courts. Twining *v.* New Jersey, 211 U. S. 78, 93. The states, either by constitution or statute, have adopted similar provisions. See, for instance, IOWA CODE, § 5484.

[5] U. S. COMP. STAT., § 1465; Wilson *v.* United States, 149 U. S. 60. See 3 WIGMORE, EVIDENCE, § 2272 and notes. Allowing inferences to be drawn has been held not to be a violation of the due process clause of the Fourteenth Amendment. Twining *v.* New Jersey, 211 U. S. 78, 99.

[6] Clifton *v.* United States, 4 How. (U. S.) 242, 247; People *v.* Cline, 83 Cal. 374, 378, 23 Pac. 391; United States *v.* Flemming, 18 Fed. 907, 916. See 3 WIGMORE, EVIDENCE, § 2273. But see State *v.* Hull, 18 R. I. 207, 211, 26 Atl. 191, 192. Although in the principal case one of the letters in question was written by the defendant, the court tried to distinguish the McKnight case where the document in question was "highly incriminating."